



Commonwealth of Massachusetts State Ethics Commission

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Senator Edward J. Clancy
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PUBLIC ENFORCEMENT LETTER

Dear Senator Clancy:

As you know, the State Ethics Commission has conducted a preliminary inquiry concerning whether you violated the state conflict of interest law, G.L. c. 268A, by, in July 1998, as state senator, improperly meeting with the chairman and vice chairman of the state Board of Registration of Chiropractors ("the Board") and seeking to influence the outcome of an adjudicatory proceeding then pending before the Board concerning one of your constituents, a chiropractor. Based upon the preliminary inquiry, the Commission voted on May 22, 2000, to find that there is reasonable cause to believe that you violated G.L. c. 268A, §23(b)(2).

The Commission has determined that the public interest would be best served by sending you this public enforcement letter bringing to your attention, and to the attention of your colleagues and the public at large, the facts revealed by the preliminary inquiry and explaining the application of the law to those facts. The Commission expects that this letter will ensure your understanding of and future compliance with the conflict of interest law. The Commission and you have agreed that there will be no formal action against you in this matter, and you have chosen not to exercise your right to a hearing before the Commission. By agreeing to this public letter as a final resolution of this matter, you do not admit to the facts and law discussed below.

I. Facts

1. You are a state senator representing the First Essex District. You have been a state senator since 1995 and were previously a state representative for the Tenth Essex District for two terms. You are also an attorney and have been a sole practitioner in Lynn for over twenty years.

2. The Board is responsible for licensing chiropractors, regulating their professional conduct, and taking disciplinary action against those chiropractors who fail to meet the regulatory standards. Board disciplinary action sometimes includes an adjudicatory proceeding to determine whether to suspend or revoke a chiropractor's license to practice. The Board meets periodically in Boston.

3. In September 1997, the Board, by an Order to Show Cause, initiated an adjudicatory proceeding against a Swampscott chiropractor for alleged violations of Board regulations. In October 1997, the chiropractor filed an Answer to the Order to Show Cause denying its allegations. In May 1998, the Board issued an Amended Order to Show Cause against the chiropractor. On June 3, 1998, the prosecution moved for summary decision against the chiropractor. On June 12, 1998, the chiropractor

filed his opposition to the motion for summary decision and moved for oral argument on the motion and opposition. The Board scheduled the hearing on the motion and opposition for July 29, 1998.

4. In 1998, the Board's chairman was Edward J. Barowsky and the Board's vice-chairman was Joseph Boyle. Chairman Barowsky and Vice Chairman Boyle were to participate in any Board decision in the adjudicatory proceeding concerning the chiropractor.

5. Your senatorial district includes Swampscott. In late May or early June 1998, a Swampscott businessman, whom you have known as a fellow Lynn YMCA member for many years, told you about the chiropractor's situation. The businessman, who told you he was good friends with the chiropractor's parents, asked you if there was anything you could do. You agreed to look into the situation. Subsequently, on June 2, 1998, the businessman sent you a copy of the Board's Order to Show Cause concerning the chiropractor, together with a copy of the chiropractor's resume and a handwritten note stating in relevant part,

I realize this is short notice; however the Chiropractic board is having a preliminary [sic] meeting on [sic] 2:30 6/3/98 Wednesday regarding this matter. [The chiropractor] is scheduled for adjudicatory hearing before the board on Friday June 5, at 9:00 a.m. ...^{1/} [The chiropractor's] attorney is trying to resolve this matter prior to a hearing. Any effort on your part (i.e. telephone call or letter to the board & members involved) will deeply be appreciated by [the chiropractor] & myself.

6. You testified that, within two days of your first learning of the chiropractor's situation, he telephoned you at your Lynn law office.^{2/} The chiropractor told you in detail about his problem before the Board. In short, the chiropractor told you that he had worked for another chiropractor who was under criminal investigation for Medicare fraud or some other fraudulent activity involving over-billing accounts, and that the chiropractor's signature stamp had been used in this activity. As a result, the chiropractor had been brought in front of the Board and was facing possible suspension or revocation of his license. You spoke with the chiropractor by telephone on more than one occasion and you, as you put it, "came to the conclusion that [the chiropractor] was a sincere upright kid... [who] had just started out and got himself into a bad situation."^{3/}

7. After your initial telephone conversation with the chiropractor, you asked one of your Senate office staffers to find out what the Board "was all about." You also had one of your Senate staff members look in the state agency directory and obtain the names and addresses of the Board's members. In addition, on June 23, 1998, the chiropractor faxed you a list of the Board's eight members' names and addresses.

8. You decided that you wanted to discuss the chiropractor's case with Board Chairman Barowsky and Vice Chairman Boyle in order to attempt to save the chiropractor's professional career by convincing Boyle and Barowsky that the chiropractor deserved the Board's leniency in the pending adjudicatory proceeding. At the time, you did not know either Boyle or Barowsky. Because both Barowsky and Boyle had addresses in the Springfield area, you decided to ask state Senator Linda Melconian, whose senatorial district includes that area, if she knew them and, if she did, to ask her to introduce you to Barowsky and Boyle so that you would not have to make "cold calls" to them.

9. On or about June 25, 1998, you spoke with Melconian at the State House and, after confirming that she knew Boyle and Barowsky, you told her you needed to talk with Boyle and Barowsky and wanted to meet with them. You did not tell Melconian why you wanted to speak with Boyle and Barowsky, except to say that a constituent matter was involved.

10. Melconian offered to set up a meeting between you and Barowsky and Boyle. She also offered her Senate office conference room for the meeting. According to Melconian, it is her normal practice to set up such meetings for her Senate colleagues.

11. In late June 1998, Barowsky and Boyle each received a telephone call from either Melconian or an aide to Melconian requesting that they meet with Melconian and you (referred to as "Senator Clancy"). The subject matter of the meeting was neither inquired about nor identified. Barowsky and Boyle testified that they assumed the meeting would relate generally to chiropractors and insurance issues. According to their testimony, had Boyle and Barowsky known that the purpose of the meeting was to discuss an adjudicatory proceeding pending before the Board, they would have declined to meet with you. Boyle and Barowsky were each told that the other had also been invited to the meeting. Both Boyle and Barowsky agreed to the meeting, which was arranged for noon on July 9, 1998, to fall immediately after a scheduled Board meeting for which they would be in Boston.

12. On July 9, 1998, you met Boyle and Barowsky in the reception area of Melconian's Senate office suite, and introduced yourself as "Senator Clancy." Neither Boyle nor Barowsky were familiar with you. You, Boyle and Barowsky engaged in "small talk" for a few minutes while waiting for Melconian. There was no discussion concerning the chiropractor at this time.

13. Melconian soon entered the reception area and asked you, Boyle and Barowsky to come into the conference room of her office suite. Melconian thanked Boyle and Barowsky for coming, introduced you as a "good friend" of hers, and indicated that you wanted to talk to them. Melconian then left the conference room and did not return.

14. After Melconian's departure, Boyle asked, "What can we do for you, Senator?" You then made what you called your "pitch," the substance of which was the following:

You told Boyle and Barowsky that the chiropractor and his family were constituents of yours and that you were anxious to have the opportunity "to put a human face on" the chiropractor's problem with the Board. You indicated how exemplary the chiropractor's background was and stated that the chiropractor's parents had made a huge financial sacrifice to get him through school, and that the chiropractor still had a large amount of student loans to repay. You stated that the chiropractor was naive and that his employer was a "bad guy" who had clearly taken advantage of him. Finally, you said that you hoped that the chiropractor's professional life would not be ruined, and you asked Barowsky and Boyle to "show mercy and not justice" and to "please not crucify" the chiropractor.

15. According to Boyle and Barowsky, they cut you off before you had finished speaking on behalf of the chiropractor and expressed to you that they could not discuss the chiropractor's matter with you because it was pending before the Board. The meeting then terminated.

16. You testified that neither Boyle nor Barowsky cut off your "pitch" and that you were able to say all that you had planned to say.^{4/}

17. On July 29, 1998, the chiropractor's matter came before the Board for oral argument on summary judgment. At the hearing, Barowsky and Boyle read aloud written disclosures they had made to the governor (their appointing authority) on July 28, 1998, concerning their meeting with you. Thereupon, the chiropractor's attorney sought their recusal. After consulting with legal counsel, Boyle and Barowsky did not recuse themselves. The chiropractor's matter was ultimately resolved by a consent agreement in 1999. The Commission is not aware of any evidence that your "pitch" to Boyle and Barowsky had any effect upon the outcome of the chiropractor's case.

18. You cooperated fully with the Commission's investigation of this matter.

II. Discussion

Legislators are often called upon by their constituents to assist them in their dealings with state agencies. Service to constituents to resolve difficulties in dealing with state agencies is, in general, a legitimate and time-honored activity of legislators. But not every service to a constituent is lawful. In this matter, the Commission has found that there is reasonable cause to believe that your above-described "constituent service" for the chiropractor, your "pitch" to the Board on his behalf, violated the conflict of interest law.

As a state senator, you are a state employee. As such, you are subject to the conflict of interest law, G.L. c. 268A. Your above-described actions on behalf of the chiropractor appear to have violated §23 of G.L. c. 268A, the "code of conduct" section of the conflict of interest law.

Section 23(b)(2) prohibits a state employee, including a legislator, from knowingly or with reason to know using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions of substantial value which are not properly available to similarly situated individuals.⁵

As set forth in detail above, you used your official position to secure a private meeting with two of the future decision-makers in the chiropractor's case in order to attempt to influence their actions in the pending adjudicatory proceeding in a manner favorable to the chiropractor. Thus, as a state senator, you obtained a meeting with Boyle and Barowsky through your Senate colleague Melconian. In addition, the meeting with Boyle and Barowsky was set up with you as "Senator Clancy." Finally, you met with Boyle and Barowsky and made your "pitch" to them for the chiropractor as a state senator.

In meeting privately with Boyle and Barowsky and attempting to influence the outcome of the adjudicatory proceeding, you went beyond assistance that you could properly have provided to your constituent; for example, testifying at the adjudicatory proceeding as a character witness or providing the chiropractor with a written character reference for submission to the Board as part of the defense case. Instead, your private "pitch" to Boyle and Barowsky on the chiropractor's behalf was an improper *ex parte* communication concerning a pending adjudicatory proceeding. That is, while you spoke for the chiropractor, the prosecuting counsel was neither present nor invited to attend to advocate for the prosecution.

As an attorney, you are aware that it is fundamental to due process that an adjudicatory proceeding be decided based upon evidence that is offered and made part of the record of the proceeding in the presence of the parties to the proceeding (or their representatives), and that *ex parte* communications concerning a pending adjudicatory proceeding are prohibited. Thus, the Standard Adjudicatory Rules of Practice and Procedure, which the Board (like many state agencies) follows, prohibit Board members from receiving any *ex parte* communication concerning a Board adjudicatory proceeding. 801 CMR §1.03(6)(a), formerly 801 CMR §1.03(10) (revised 12/25/98). Accordingly, Boyle and Barowsky would not have met with you had they known your purpose was to make a "pitch" in order to influence the outcome of the adjudicatory proceeding. Nor would they have listened to your *ex parte* "pitch" on the chiropractor's behalf had they known it was coming. Neither could they nor any other Board member have properly met privately with or listened privately to any other person wishing to make an *ex parte* "pitch" in order to influence the outcome of any adjudicatory proceeding.

pending before the Board. Thus, your “pitch” for the chiropractor, at an *ex parte* meeting with Boyle and Barowsky which you obtained through the use of your position as a state senator, was an unwarranted privilege which was not properly available to similarly-situated persons.

Given that the chiropractor’s professional license was at stake in the adjudicatory proceeding before the Board, your effort to influence the outcome of the proceeding was of substantial value for the chiropractor. See *In re Burke*, 1985 SEC 248, 251 (access to executives to make an insurance sales pitch was of substantial value because it makes sales more likely). It is likely that, were such meetings not prohibited, almost every adjudicatory proceeding subject would seek an *ex parte* meeting with the decision-makers to argue the subject’s position on the merits of the case in the hopes of influencing the outcome in the subject’s favor. Thus, by making your “pitch” for the chiropractor at an *ex parte* meeting with Boyle and Barowsky, you secured for the chiropractor an unwarranted privilege of substantial value.^{6/}

Accordingly, there is substantial evidence to warrant the conclusion that you, knowingly or with reason to know, used your position as a state senator to secure for the chiropractor an unwarranted privilege of substantial value which was not properly available to similarly-situated persons. Thus, there is reasonable cause to believe that you violated §23(b)(2)^{7/}

III. Disposition

Your attempt to influence the Board in the pending adjudicatory proceeding concerning the chiropractor through an *ex parte* communication posed a substantial threat to the Board’s ability to fairly and impartially resolve that case, in short to do justice in the case. Had your “pitch” succeeded, the adjudicatory process would have been subverted. Rather than being decided on the merits of the evidence presented by both prosecution and defense in a public proceeding, the case would have been decided based upon the persuasiveness of an *ex parte* plea of a high ranking public official. This was only averted by the conscientiousness of Barowsky and Boyle.

Therefore, the facts warrant a public resolution. The Commission decided to resolve this case with a public enforcement letter, however, rather than imposing a fine, because there may be some good faith confusion as to where the line is drawn between properly zealous advocacy on behalf of a constituent and improper communications when it comes to administrative agency adjudicatory proceedings. The Commission has not previously addressed how §23 applies to a legislator’s efforts to assist a constituent with a state agency adjudicatory proceeding. Section 23’s application to such constituent services should now be clear.

Based upon its review of this matter, the Commission has determined that this public letter should be sufficient to ensure your understanding of and future compliance with the conflict of interest law. This matter is now closed.

DATE: November 14, 2000

^{1/}The June 1998 proceedings were later rescheduled.

^{2/}In your dealings with both the businessman and the chiropractor you were acting in your capacity as a state senator, and not as a private attorney. You were not compensated by either the businessman or the chiropractor for your

efforts to help the chiropractor with the Board. You testified that you considered your efforts on behalf of the chiropractor to be consistent with your role as a legislator.

^{3/}You testified that, as of June 1998 you were familiar with the chiropractor's family's name, but had never met the chiropractor or his parents. You did not meet the chiropractor in person until some time in late 1998.

^{4/}You testified that your version of the meeting is supported by your daily planner, which has an entry for the meeting marked with a check mark. According to you, the check mark means that the meeting was routine and that had you been cut off or badly received there would be no check mark but instead a verbal notation such as "ouch".

^{5/}Although under some circumstances §4 of G.L. c. 268A permits legislators to appear in matters before state boards or agencies, it does not permit them, in appearing before such agencies, to violate §23(b)(2).

^{6/}This is true, even in the absence of any evidence that your "pitch" in any way actually helped the chiropractor, because the unwarranted privilege of making an *ex parte* argument on behalf of the chiropractor was itself of substantial value regardless of its ineffectiveness.

^{7/}It should be noted that even if circumstances had fully prevented you from making your "pitch" on behalf of the chiropractor at the meeting with Boyle and Barowsky, it would still be concluded that there was reasonable cause to believe that you violated §23(b)(2). This is because §23(b)(2) applies to attempts to use one's official position to secure an unwarranted privilege as well as to actual use. Thus, your use of your official position to obtain the meeting with the Board meeting was sufficient, given your intent to thereby attempt to influence the outcome of the chiropractor's case, to place you in apparent violation of §23(b)(2).